STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 316828 Wayne Circuit Court
DEREK RICARDO HARTFIELD, Defendant-Appellant.	LC No. 12-010842-FH

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of one count of criminal sexual conduct, second degree, MCL 750.520c(1)(b) (CSC II), and two counts of criminal sexual conduct, fourth degree, MCL 750.520e(1)(a) (CSC IV). He was sentenced to concurrent prison terms of 2 to 15 years for the CSC II conviction, and 2 years for each conviction of CSC IV. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The two victims, KJ and SJ, are sisters, ages 14 and 16 at the time of the offenses, who lived in an apartment with their mother. Defendant, a friend of the mother, was allowed to stay in the living room of the apartment. He had also lived with them approximately one year earlier. When he moved in again in 2012, he showered there, ate meals there, kept his clothes and belongings there, and was at the apartment most of the time. The acts that formed the basis of the charges against defendant occurred at this apartment during that time.

KJ testified that in May of 2012 (when she was 14) she was cleaning up the living room area when defendant started throwing pillows at her, and they had a "pillow fight." When one of the pillows hit her and threw her off balance, she fell to the ground. Defendant then pinned her down by grabbing her forearms with his hands and held her arms tightly. She was unable to get away. He got on top of her, with his back on top of her chest and stomach and tried to pull her pants down. She kept her pants up by pulling them in the opposite direction. He touched her vagina on top of her clothing with his fingers, and moved his fingers in a circular motion over her vagina for approximately a minute. She could not get up. She told him to get off of her, and that she could not breathe. Finally, he got off of her. Then he asked her if she had had an orgasm and if she knew what that meant.

KJ also testified to a separate incident where she was sitting on the couch and defendant held her wrists with his hands and pinned her down on the couch. He got on top of her, facing her, and started moving his head and cheeks back and forth between her breasts on top of her clothing. She kept telling him to get up and to stop. She called for her older sister numerous times. Defendant told her, "You like this sweat," and "You know you like it." When her older sister came into the room, defendant stopped.

SJ testified regarding this incident that when KJ left the room, defendant started chasing her around the room and had either water or sweat on his face. He took hold of her arms between her elbows and her wrists and pushed her down on the couch. He got on top of her, still holding her arms down, and pressed his stomach and legs on her body. Then he rubbed her neck and cleavage area with his cheeks and nose and made a "grunting sound." She told him to stop several times before he got off of her.

During the trial, the victims' mother testified that she had met defendant on a website over five years earlier. They dated for about a week and decided to be just friends. He had lived with her and her daughters on two occasions, the first occurring about a year earlier than the second; he moved in with her for the second time in May 2012. She let him move in because he "gave me the same sob story," that he lost his house and had no place to live, and he said he would commit suicide. He said he had no family and had broken up with his wife. Everything was fine at first. They shared the same religion and prayed together and talked about the bible. However, a little bit later, she was off work one day and he came into her room and pinned her down on the bed and tried to pull her clothes off; she told him not do that. Defense counsel objected to this testimony, and the jury was dismissed. Following voir dire of the witness, the trial court agreed to give a curative instruction for the jury to disregard the statement concerning the alleged physical contact between the witness and defendant because the witness had not disclosed this information to the prosecution prior to trial.

The jury convicted defendant as described above. At sentencing, the trial court scored Offense Variable (OV) 9 at 10 points for two or more victims placed in danger of physical injury or death. The trial court imposed the sentences described above.

This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE/GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that there was insufficient evidence that he committed the alleged acts "for a sexual purpose," or that he was a member of the victims' household or held "a position of authority" over them. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecutor proved the elements of the charged offense beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). Circumstantial evidence, and the reasonable inferences drawn from that evidence, can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). This Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). A victim's

testimony can, by itself, be sufficient to support a conviction of criminal sexual conduct. *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012).

The offenses of which defendant was convicted require "sexual contact," which includes "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner" for revenge, to inflict humiliation, or out of anger. MCL 750.520a(q). The statute defines "intimate parts" as "the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

Concerning the element of sexual purpose on the charge of CSC II, and viewing the evidence in the light most favorable to the prosecution, we find that a reasonable person could construe beyond a reasonable doubt that defendant touched KJ's intimate parts or the clothing covering the immediate area of her intimate parts for the purpose of sexual arousal or gratification, as defendant moved his fingers over her vaginal area and then asked if she had had an orgasm.

Concerning the element of sexual purpose on the charges of CSC IV, and viewing the evidence in the light most favorable to the prosecution, we find that a reasonable person could construe beyond a reasonable doubt that defendant rubbed his face back and forth between both victims' breasts for the purpose of sexual arousal or gratification. Defendant's contention that he was just trying to get his sweat on them as part of "playful contact" or "in a playful manner" is without credibility and was not argued at trial. In fact, defendant argued that the sisters made up these allegations because they did not want him in the household. It was clear that the jury found the victims' testimony to be credible. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In addition to sexual contact, if the victim is between the ages of 13 and 16, a conviction for CSC II requires proof of an additional element. MCL 750.520c(1)(b). Relevant to the instant case, the jury was required to find that at the time of the offense defendant either was "a member of the same household as the victim" or was "in a position of authority over the victim and the actor used this authority to coerce the victim to submit." *Id*. We find that the prosecutor proved both alternatives beyond a reasonable doubt. MCL 750.520c(1)(b)(*i*) and (*iii*). It is clear from the evidence that defendant was living in the household. He had his belongings in the house, ate there, slept there, showered there, and spent the majority of his time there; the victim's mother additionally testified that defendant had no other place to live. His presence there could not be construed as a brief or chance visit. *People v Phillips*, 251 Mich App 100, 103-204; 649 NW2d 407 (2002). Nor does the law require that members of a household be related. *Id*. at 103-104.

In addition, the evidence was also sufficient to support the second alternative; that defendant was in a position of authority and used that position of authority to coerce the victim. He was an adult in the household, the victim's mother had designated him as the KJ's godfather, and he began having "father-daughter talks" with her, during which he asked her personal questions about her behavior. It was clear from the testimony of both KJ and her mother that defendant had a position of authority in the household. While in this position of authority (and this Court notes that defendant was the only adult in the home at the time these offenses

occurred), defendant used physical force to coerce his victims into sexual contact. See *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995). Accordingly, viewing the evidence in the light most favorable to the prosecutor, the evidence was sufficient to prove the elements of the charged offenses beyond a reasonable doubt.

Similarly, we find no merit to defendant's contention that the verdict was against the great weight of the evidence. Defendant did not move for a new trial in the trial court. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Thus, he must demonstrate plain error affecting his substantial rights. *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Based on the evidence presented at trial, we find that the evidence did not heavily preponderate against the verdict, and defendant has failed to demonstrate any plain error that affected his substantial rights. The evidence at trial weighed in favor of defendant's guilt for all of the charged offenses.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant contends that he was denied the effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing in the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, our review is limited to mistakes apparent on the record. *Id.*; *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Whether a defendant received ineffective assistance of counsel presents a mixed question of constitutional law and fact; the trial court's constitutional determinations are reviewed de novo, and its factual findings are reviewed for clear error. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). To justify reversal under the state and federal constitutions for ineffective assistance of counsel, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). "[D]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. . . . We will not second-guess counsel on matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Additionally, this Court will not "assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant first contends that he asked his trial attorney to impeach the victims with their prior inconsistent statements made at the preliminary examination, but that the attorney did not

comply with his wishes. The failure to impeach a witness on all contradictory aspects of his or her preliminary examination and trial testimony is not definitive evidence of ineffective assistance of counsel and is generally considered a matter of trial strategy. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Upon review, we find that defendant has failed to demonstrate a reasonable probability that defense counsel's failure to impeach the witnesses on all contradictory aspects of their preliminary examination and trial testimony would have changed the outcome of the trial. *Mitchell*, 454 Mich at 158. Inconsistencies between the victims' preliminary examination testimony and their trial testimony were generally minor; further, in many instances, the victims' trial testimony was simply more detailed than their preliminary examination testimony, rather than contradictory. Further, defense counsel conducted a thorough cross-examination of the victims, including exploring the theory that the victims had a motive to fabricate their testimony, i.e., that defendant had informed their mother that KJ had told him she was drinking, using marijuana, and skipping school. We find that defendant has not demonstrated that his counsel's decision not to impeach the victims through introduction of their preliminary examination testimony was objectively unreasonable or outcome determinative. *Mitchell*, 454 Mich at 158; *Werner*, 254 Mich App at 534.

Next, defendant contends that he was denied effective assistance of counsel because defense counsel failed to impeach KJ with portions of a tape recording of her statements regarding her use of marijuana and alcohol and skipping school, which the court had ruled could be admitted. However, defendant has not demonstrated that this recording would have changed the outcome of the trial; particularly because trial counsel was able to explore these issues during cross-examination, and in any event the recording would not have impacted SJ's credibility. *Id*.

Defendant next contends that he was denied the effective assistance of counsel because, despite his request, defense counsel failed to challenge for cause or use a peremptory challenge to dismiss a juror who, during voir dire, explained that she had been molested as a child. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy . . . ." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Defense counsel's failure to challenge a juror generally does not constitute ineffective assistance of counsel due to the various factors that go into assessing a particular juror's suitability. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). Here, the record shows that, upon extensive questioning by the trial court and defense counsel, the juror very clearly stated that she could be fair and impartial. We disagree that defendant's counsel was ineffective in failing to remove this juror.

Next, defendant contends that he was denied the effective assistance of counsel because defense counsel failed to move for a mistrial when the victims' mother testified before the jury that defendant had held her down and attempted to remove her pants. Defendant argues that the prosecution's failure to give prior notice, pursuant to MRE 404(b), regarding this other acts testimony would have entitled him to a mistrial, if defense counsel had made the motion. The record shows that, when questioned outside the presence of the jury, the mother never stated that she actually told the prosecutor this information before trial. The record lacks definitive evidence that the prosecution had prior knowledge of this testimony so as to require it to file a

MRE 404(b) motion.[1] Additionally, the parties agreed on a curative instruction, which was given to the jury. Curative instructions are presumed to cure most errors. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). Finally, the victims' testimony was sufficient to support defendant's conviction without any additional evidence. *Brantley*, 296 Mich at 551. The record does not support the inference that the trial court would have granted a motion for a mistrial on this ground had defense counsel made one; counsel is not required to lodge meritless objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

IV. PROSECUTORIAL MISCONDUCT

Next, defendant alleges several incidents of conduct by the prosecutor that he contends rose to the level of prosecutorial misconduct. The alleged instances of misconduct were not timely objected to before the trial court. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We therefore review this issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Defendant can demonstrate plain error if he can show that an objection could not have cured the error or that failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

"Prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). Our review of the record shows that none of the examples presented by defendant constituted plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763-764.

First, defendant relies on the prosecution's failure to give MRE 404(b) notice regarding the victims' mother's testimony concerning defendant's conduct toward her. This issue was addressed in Part III, above. Because we conclude that there was no actual evidence that the prosecution had any prior knowledge about the witness's testimony concerning prior acts, we find that no misconduct occurred.

Next, defendant claims that the prosecution misstated KJ's testimony during closing argument in the follow ways: (1) the prosecution told the jury that KJ testified, "I know you like it sweaty like that" and "You like it sweaty like that," but that KJ actually testified that he said "you like this sweat" and "you know you like it"; (2) the prosecution misrepresented KJ's testimony concerning the length of time he moved his fingers over her vaginal area by stating it went on for "two or three minutes" when KJ testified that it lasted "about a minute"; (3) the prosecution stated that the victims were too young to interest defendant during his previous stay

[1] We note that this testimony may in fact have been admissible under MRE 404(b) for the purpose of showing opportunity, intent, scheme, plan, or system in doing an act. *People v Smith*, 282 Mich App 191, 195-196; 772 NW2d 428 (2009); *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). Had defense counsel requested a mistrial, and had the mistrial been granted, the prosecution would have had the opportunity to seek admission of the mother's other acts testimony in the new trial. Thus, the failure to request a mistrial on this ground may well have been a strategic choice on the part of defense counsel.

at their house; (4) the prosecution stated that the victims "were comparing notes" immediately following the incidents that gave rise to defendant's CSC IV convictions; and (5) the prosecution described defendant as putting his "whole body weight" on top of KJ, but KJ actually testified that he was "pretty much on top, but he's slightly off."

Finally, defendant claims that the prosecution misstated the burden of proof in saying:

> I spoke with your [sic] earlier about what beyond reasonable doubt in fact is. Not beyond all doubt. There's always shoshe [sic] of doubt here and there. And again, unless you were there, you can't say beyond reasonable doubt.

Any arguable misstatements of the law did not affect the fairness or integrity of the judicial proceedings. With regard to the alleged misstatement of the burden of proof, the prosecutor's earlier unobjectionable statement concerning reasonable doubt,[2] and, more importantly, the court's instructions to the jury, overcame any misstatement of the law. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In addition, a timely request for a curative instruction would have cured the error. *Unger*, 278 Mich App 234-235. The other alleged misstatements of the facts were either supported by the record and the reasonable inferences arising from the facts, or were not pertinent to the establishment of the elements of the charged crimes. Defendant has not demonstrated a plain error that "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774. Further, defendant has not demonstrated that his counsel's failure to object to any of the alleged instances of misconduct fell below an objective standard of reasonableness or were outcome determinative. *Mitchell*, 454 Mich at 158; *Werner*, 254 Mich App at 534.

V. SENTENCING

Finally, defendant contends that OV 9 was improperly scored at 10 points and should have been scored at zero points because there was only one complainant for each charge and no

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[2] In the prosecutor's opening statement, she stated:

> Beyond a reasonable doubt. Let's just take a moment to talk about that. That is my burden.
>
> So, what is beyond a reasonable doubt? It's not beyond all doubt, ladies and gentlemen.
>
> Because if it were beyond all doubt, all 14 of you would have had to have been sitting in that living room, in that apartment in Westland last spring, and been watching what [defendant] was doing to [KJ] and to [SJ].
>
> And unfortunately, I don't have a time capsule that can catapult us back to that time.

other person was placed in danger of injury from any of the offenses, and further that his sentences represent a departure from the sentencing guidelines. We disagree. Defendant objected to the scoring of OV 9 at sentencing; however, he did not object to any of the sentences he received on the ground that it represented a departure from the sentencing guidelines. We review for clear error a trial court's factual determinations with respect to the scoring of offense variables in the sentencing guidelines, and such determinations "must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We consider de novo the legal question of statutory interpretation inherent in "whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Id*. The issue of whether defendant's sentences represent a departure from the guidelines is unpreserved, *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993), and defendant must demonstrate plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

OV 9 addresses the number of victims. MCL 777.39(1). The trial court must score 10 points under OV 9 if two to nine victims were placed in danger of physical injury or death. MCL 777.39(1)(c). Each person who was placed in danger of physical injury or loss of life is considered a victim for purposes of OV 9. MCL 777.39(2)(a); *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). The prosecution must prove by a preponderance of the evidence that the facts are as asserted. *People v Althoff*, 280 Mich App 524, 541-542; 760 NW2d 764 (2008). A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim. See *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009).

Here, defendant argues that the record does not show that SJ was home when the sentencing offense[3] (the incident where defendant lay on top of KJ and moved his fingers over her vaginal area) was committed. The trial record is somewhat unclear on this issue; however KJ's preliminary examination testimony clearly states that KJ was home at the time. In *People v Ratkov (After Remand)*, 201 Mich App 123; 505 NW2d 886 (1993), the Court held, regarding calculations under the sentencing guidelines, that a "sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *Id*. at 125. The complete record thus supports the trial court's scoring of OV 9. Therefore, defendant has failed to demonstrate plain error in the scoring of OV 9 at 10 points. Because defendant's claim that his CSC II sentence was a departure from the sentencing guidelines is premised on his obtaining a score of zero for OV 9, we accordingly find no merit to that claim.

[3] The sentencing offense is the conviction with the highest crime classification. See MCL 777.21; *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). In this case, defendant's conviction for CSC II is the sentencing offense.

Regarding defendant's claim that his two-year sentences for CSC IV represented a departure, his argument that the sentencing guidelines apply to sentences other than the sentencing offense has been rejected by this Court. *People v Lopez*, ___ Mich App ___; ___NW2d ___ (2014). Because the trial court was not required to score the lesser concurrent sentences, the sentences imposed were not a departure.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly